IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

INCOME TAX REFERENCE No. 215 of 1993

For Approval and Signature:

HON'BLE MR.JUSTICE D.A.MEHTA

HON'BLE MS.JUSTICE H.N.DEVANI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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THE COMMISSIONER OF INCOME TAX - Petitioner(s)
Versus
PRAGATI CO.OP BANK LTD. - Respondent(s)

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Appearance :

MR B.B.NAIK for Petitioner No(s).: 1.
MR RK PATEL for Respondent No(s).: 1.

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CORAM :THE HON'BLE MR.JUSTICE D.A.MEHTA
HON'BLE MS.JUSTICE H.N.DEVANI

Date : 29/06/2005

ORAL JUDGMENT

(Per : THE HON'BLE MR.JUSTICE D.A.MEHTA)

1 The Income Tax Appellate Tribunal, Ahmedabad Bench 'C' has referred the following question under section 256(1) of the Income Tax Act, 1961 (the Act) at the instance of the Commissioner of Income Tax.

> *"Whether on the facts and in the circumstances of the case, the Appellate Authority was right in law in confirming the order of the CIT(A) deleting the addition of Rs.1,80,95,811/- in respect of fixed deposit and Rs.21,71,500/- in respect of interest?"*

2 The Assessment Year is 1983-84 and the relevant accounting period is 1.7.1981 to 30.6.1982. The assessee, a Cooperative Society, is engaged in business of banking. As against returned income of Rs.14,317/- the Assessing Officer assessed at a total income of Rs.2,02,61,628/- by an order of assessment dated 31.3.1986.

3 It appears that there were search proceedings under section 132 of the Act on 24.12.1983 at the premises of the bank and due to various

discrepancies/irregularities in the records maintained by the assessee bank, with special reference to issuance of various fixed deposit receipts authorized officer issued a prohibitory order of attachment under section 132(3) of the Act, directing the assessee bank not to take any action in relation to fixed deposit receipts. It is an admitted position that the said prohibitory orders were modified/lifted from time to time on partial basis depending on different applications moved by the assessee bank.

4 The Assessing Officer has made additions to the tune of Rs.1,80,95,811/- as income from undisclosed source representing fixed deposits as unexplained for the reasons stated in the order. He also made an addition, as a consequence, to the tune of Rs.21,71,500/- towards interest on the aforesaid fixed deposits by applying rate of 12% p.a. to the figure of Rs.1,80,95,811/-. The principal grounds on which the addition have been made by the Assessing Officer are :

[i] There are various discrepancies in the record maintained by the bank;

[ii] The assessee has failed to furnish complete details, including addresses of various depositors in whose name fixed deposits have been issued.

5. The assessee carried the matter in appeal before CIT (Appeals) who vide his order dated 3.10.1986

deleted both the additions for the reasons stated in his order. The revenue carried the matter in appeal before the Tribunal and the Tribunal for the reasons stated in its order dated 11.3.1992 has confirmed the findings of CIT (Appeals) and dismissed the departmental appeal.

6. Mr.B.B.Naik , learned Standing Counsel appearing on behalf of the applicant revenue has reiterated the reasons which weighed with the Assessing Officer. Elaborating on the first ground, it was submitted that the Assessing Officer has found on examination of the record maintained by the bank, that the specimen signature cards did not contain addresses in some cases, did not contain signatures of the bank officials in some cases, interest was paid to one person despite the fact that the fixed deposits were issued in names of different persons and in some cases signatures of the recipients of interest are not legible/verifiable. He therefore urged that the Assessing Officer was justified in making the additions in question and both the CIT (Appeals) and the Tribunal had erred in deleting the additions. It was also contended by Mr.Naik that Tribunal had made a very sweeping statement that in case of a bank no addition could be made under Section 68 of the Act. That the Tribunal had failed to take into consideration that in a given set of circumstances even a bank could earn undisclosed income and bring it in its regular books by way of

fictitious fixed deposits. He therefore urged that the assessment order be restored while quashing and setting aside the orders of the CIT (Appeals) and the Tribunal.

7 Mr.R.K.Patel appearing on behalf of the respondent assessee submitted that the additions had rightly been deleted by the appellate authorities after concurrently recording various findings of fact on appreciation of evidence which was produced by the assessee. A grievance was made that though the Assessing Officer had called for details of fixed deposits wherein the amount involved was more than Rs.10,000/-, ultimately the addition comprised of various deposits which were even below the amount of Rs.10,000/-. That the Assessing Officer had equated irregularity committed by the staff of the assessee bank in maintenance of record with deposit of unaccounted money by treating deposit of third party depositors as income of the assessee bank. That the CIT (Appeals) and Tribunal had rightly taken cognizance of the fact that more than 90% of the fixed deposit holders were having either Savings Account or Current Account with the bank and such accounts had neither been doubted nor, balance in those accounts treated as undisclosed income of the assessee bank. He therefore urged that no interference was called for and the reference was liable to be rejected.

8 In light of the fact that Tribunal has confirmed the order of CIT (Appeals) the findings recorded by CIT (Appeals) may be briefly adverted to. Referring to the basis adopted by the Assessing Officer like payment of interest to one person when the fixed deposits were in the name of different persons, signatures of the recipients not being legible etc., the CIT (Appeals) has held that in case of payment of interest relating to several deposits in the name of several persons being made to a single person, the appropriate course for the Assessing Officer ought to have been to hold the later person, namely the single recipient, as real owner of all the deposits, and for this purpose the Assessing Officer ought to have made necessary and further investigation as to real owner of the fixed deposits. Secondly, on appreciation of the evidence in the form of statement of the Manager of the Bank recorded on oath on 2/3/1985 it is found by the CIT (Appeals) that the Assessing Officer has disregarded the said statement without appreciating that said statement has explained the reasons due to which there were discrepancies/irregularities in the maintenance of records. It is stated in answer no.11 that certain lapses have occurred on account of heavy workload, inadequate staff, calibre of the staff being of substandard nature , rapid progress of the bank with insufficient infrastructure. Similarly in reply to

question no.10 as regards missing signatures of bank officials, the reason advanced by the Manager is that on a given date the concerned officer may be on leave but to facilitate the convenience of the customer fixed deposit receipt is issued on the same day and the officer, who is expected to sign the same on the next day, did not sign due to pressure of work. It is further explained that ultimately these are internal procedural steps devised by the bank and the default of the bank in not meticulously following the procedure would result in mere irregularity but cannot convert fixed deposit of a third party as income of the bank. CIT (Appeals) has further taken cognizance of the fact that the assessee bank, being a Cooperative Bank is amenable to periodical inspection by the officers of the Reserve Bank of India, and in fact under Section 35 of the Banking Regulations Act,1949 officers from Ahmedabad Regional Office of Reserve Bank of India have carried out inspection between 20.2.1984 to 16.3.1984. Referring to the inspection report, CIT (Appeals) has noted that the various violations of RBI guidelines and directions, reflect that the deposits are made by an identifiable person and that for obtaining deposits the assessee bank has made payment in cash at the time of deposit. It has further been recorded by CIT (Appeals) that while lifting prohibitory orders the authorities have taken cognizance of the fact that against security of fixed deposits bank had advanced loans to the deposit holders. That assessee bank has

placed on record affidavits of the depositors which confirm that the deposits have been made by the persons making affidavits, and the affidavits contain details like addresses, G.I.R.Numbers, or permanent Account Numbers. That prohibitory orders have been lifted after due verification of such affidavits as well as accounts of the deposit holders. In this context CIT (Appeals) has recorded that each communication modifying the prohibitory order invariably refers to the explanation tendered by assessee and only certain specific fixed deposits are released from the operation of prohibitory order depending upon the evidence furnished. CIT (Appeals) states that he is unable to visualize a contingency where such prohibitory orders would be lifted in absence of any satisfaction recorded by concerned authority as to identity of the depositors and the genuineness of the deposits. Rejecting ground about non supply of addresses recorded by the Assessing Officer, it is observed by CIT (Appeals) that evidence, which included even addresses of the depositors, was filed before A.D.I. Investigation and I.T.O. Survey, Ward 'A', who were responsible for either partially vacating or lifting the earlier prohibitory orders and such evidence could not have been ignored by Assessing Authority.

8.1 It is further found by CIT (Appeals) that the record reveals that the Assessing Officer had deputed

his Inspector to make inquiries about certain deposits; that the said persons had confirmed the fact of making deposits and explained the source of such deposits. In case the Assessing Officer was not satisfied with the explanation tendered by such depositors it was open to the Assessing Officer to take appropriate action in this regard, including treating the said deposits as income from undisclosed source in the hands of such depositors. That in cases where the depositors had Savings Account or Current Account with the assessee bank the Assessing Officer having not doubted/disputed the genuineness of such accounts no adverse inference in case of such depositors was possible by disregarding their identity and the entire approach was inconsistent and without any basis.

8.2 The Assessing Officer has proceeded on two fold presumptions while making addition as to interest : Firstly, that all the deposits were made on the first day of the accounting year; and secondly, that all the deposits carried uniform rate of interest viz. 12% p.a. CIT (Appeals) has found both the premises to be fallacious taking into consideration the fact that interest on fixed deposits varied between 4% to 11% during the year under consideration depending upon period for which amount was deposited and hence the entire addition on account of interest has also been deleted.

8.3 CIT (Appeals) has further found that the assessee bank carries on business of banking under licence issued by Reserve Bank of India and as such in absence of any material available on record it was not possible to presume that the assessee indulged in any other activity apart from banking. That the Assessing Officer by holding that the assessee had earned income from undisclosed source was indirectly proceeding on a surmise that the bank was indulging in activity other than banking activity and such surmise was not borne out from the record.

9 While confirming the aforesaid findings of CIT (Appeals) the Tribunal has recorded :

[i] In a case of bank it was not possible to state that it is undisclosed income : if there is any such income, it would be of the depositors and not of the bank;

[ii] The names and addresses of all depositors had been supplied by the assessee as demanded by the Assessing Officer and the Assessing Officer had agreed to treat the same as samples of the total number of depositors as is evident from the communication referred to by the assessee and by the CIT (Appeals); this fact was not disputed by the revenue;

[iii] Assessee's letter dated 10.3.1986 gave

sufficient indication regarding particulars of the deposits and depositors and thereafter it was for the Assessing Officer to carry out necessary investigation in respect of the depositors, if he had any doubts about the capacity of the investors;

[iv] Failure of the Assessing Officer to make further investigation cannot justify an addition in hands of the assessee;

[v] The statement of the Clerk in charge of fixed deposits reveals the procedure for acceptance and repayment and explains the causes for irregularities in the specimen signature cards;

[vi] The said statement, according to Tribunal, clearly reveals that these are cases of inadvertence in the course of accepting and repaying hundreds of deposits.

10 In light of the aforesaid findings recorded by CIT (Appeals) and the Tribunal whether it can be said that any error, as such, had been committed in law while deleting the additions. A brief resume of the established legal position may be undertaken.

11 Section 68 of the Act requires that there has to be a credit in the books maintained by an assessee;

such credit has to be of a sum during previous year; and the assessee offers no explanation about the nature and source of such credit; or the explanation offered by the assessee is not, in the opinion of the assessing authority, satisfactory, then the sum so credited may be charged to tax as income of the assessee of that previous year. The Apex Court in the case of *Commissioner of Income Tax Vs. Smt.P.K.Noorjahan, (1999) 237 ITR 571* has laid down that the word "may" indicated the intention of the legislature that a discretion was conferred on the Assessing Officer in the matter of treating the source of investment/credit which had not been satisfactorily explained as income of an assessee, but it was not obligatory to treat such source as income in every case where the explanation offered was found to be not satisfactory.

12 Applying the aforesaid principle to the facts found it is not possible to state that the Tribunal committed any error when it confirmed the findings of CIT (Appeals) deleting the addition. The assessee offered an explanation. The said explanation is not found to be false. The Assessing Officer merely does not accept the explanation because he finds it not satisfactory. From that, legally there is no obligation, on the Assessing Officer, to treat the fixed deposits as income of the assessee.

13 In the case of *Commissioner of Income Tax Vs. Daulat Ram Rawatmull (1973) 87 ITR 349,* the Apex Court was called upon to decide the issue as to whether the deposit standing in the name of son of the partner of a firm could be treated as belonging to the respondent firm because the respondent firm had offered the fixed deposit receipt as collateral security to the bank while taking a loan from the bank. It is laid down by the Apex Court that firstly, the onus of proving that the apparent was not the real was on the party who claimed it to be so; secondly, the question was not whether the amount really belonged to the son of the partner, but whether it belonged to the firm. That as it was the revenue which claimed that the amount of fixed deposit receipt belonged to the respondent firm even though the same had been issued in the name of the son of the partner, the burden was on the department to prove that the firm was the owner. The fact that the son of the partner was not able to satisfactorily explain the source of amount put in the fixed deposit would not be decisive even of the matter as to whether son of the partner was or was not the owner of the amount. That from the simple fact that the explanation regarding the source of money furnished by son of the partner, in whose name the money was lying in deposit, had been found to be false, it would be a remote and far-fetched conclusion to

hold that the money belonged to the firm. That in such a case there was no direct nexus between the facts found and the conclusion drawn therefrom. In the present case admittedly, the Assessing Officer had not been able to discharge the onus of proving that the apparent was not the real, as it was the department which was claiming that the monies belong to the assessee bank despite the fact that fixed deposit receipts stand in the name of the third parties. Even if explanation tendered by the depositors is not found to be satisfactory or is found to be false, it would be a remote and far-fetched conclusion to hold that the monies belong to the assessee bank.

14 However, as Section 68 of the Act denotes, once there is a credit in the books maintained by the assessee the primary onus is on the assessee, namely, to offer an explanation as to the nature and source of the credit. What would be the degree of the onus and what should be the extent of explanation in such circumstances is answered by Patna High Court in the case of *Sarogi Credit Corporation Vs. Commissioner of Income Tax (1976) 103 ITR 344* in the following words:

> *" xxx xxx if a credit entry stands in the name of the assessee himself, the burden is undoubtedly on him to prove satisfactorily the nature and source of that entry and to show that it does not constitute a part of his income liable to tax. If*

the credit entry stands in the names of the assessee's wife and children, or in the name of any other near relation, or an employee of the assessee, the burden lies on the assessee, though the entry is not in his own name, to explain satisfactorily the nature and source of that entry. But, if the entry stands not in the name of any such person having a close relation or connection with the assessee, but in the name of an independent party, the burden will still lie upon him to establish the identity of that party and to satisfy the Income-tax Officer that the entry is real and not fictitious. Once the identity of the third party is established before the Income-tax Officer and other such evidence are prima facie placed before him pointing to the fact that the entry is not fictitious, the initial burden lying on the assessee can be said to have been duly discharged by him. It will not, therefore, be for the assessee to explain further as to how or in what circumstances the third party obtained the money and how or why he came to make an advance of the money as a loan to the assessee. Once such identity is established and the creditors, as in the instant case, have pledged their oath that they have advanced the amounts in question to the assessee, the burden immediately shifts on to the department to show as to why the assessee's case could not be accepted and as to why it must be held that the

entry, though purporting to be in the name of a third party, still represented the income of the assessee from a suppressed source. And, in order to arrive at such a conclusion, even the department has to be in possession of sufficient and adequate materials. xxx xxx xxx the Income-tax Officer's rejection not of the explanation of the assessee, but of the explanation regarding the source of income of the depositors, cannot by itself lead to any inference regarding the non-genuine or fictitious character of the entries in the assessee's books of account".

This Court is in respectful agreement with the aforesaid principles. In the case of Deputy Commissioner of *Income Tax Vs. Rohini Builders (2002) 256 ITR 360* this Court has while dismissing Departmental Tax Appeal upheld the approach of the Tribunal based on the judgment of Patna High Court that an assessee can be asked to prove source of credit in books but cannot be asked to prove source of source.

15. Applying the settled legal position to the facts of the case it is apparent that the assessee had furnished the details which would discharge the onus which lay on the assessee considering the fact that deposits were made by third parties viz. Customers of the bank. It is nobody's case that the

deposits were made either by the Directors of the assessee bank or any of the relatives of the Directors. As to what would be the scope of the inquiry and the degree of proof that would be required in such circumstances, is not required to be dealt with in the fact situation of the present case. The opinion expressed by the Patna High Court has been impliedly approved by the Apex Court in the case of *Commissioner of Income Tax Vs. Orissa Corporation P.Ltd. (1986) 159 ITR 78 (SC)* when it is stated that once the assessee had given the names and addresses of the alleged creditors and it was in the knowledge of the revenue that the said creditors were income-tax assessees, if the revenue did not make any effort to pursue the so called alleged creditors the assessee could not do anything further and the assessee had discharged the burden that lay on the assessee. It was for the revenue to examine the source of income of the alleged creditors to find out their creditworthiness.

16 The finding by the Tribunal that the assessee bank cannot have any undisclosed income has to be appreciated in the context of finding by the C.I.T. (Appeals) that the activities of the assessee bank are regulated by the provisions of the Banking Regulations Act,1949 and the guidelines issued by Reserve Bank of India. This is apart from the fact that under provisions of section 80P of the Act entire

income from banking activities is exempt in the hands of the assessee, a co-operative bank. Thus there can exist no reason for the assessee bank to indulge in any activity which would yield undisclosed income.

17 Therefore, in the facts and circumstances of the case the findings recorded by the both CIT (Appeals) and the Tribunal establish that the assessee had discharged the primary onus which was on it by offering explanation, and the said explanation has not been found to be incorrect or false in any manner. The grievance made by the Assessing Officer that complete details and addresses of the depositors were not furnished has been categorically found to be incorrect in light of facts which have come on record and as found by the Tribunal. Similarly as regards the defects in maintenance of records of the bank , both the CIT (Appeals) and the Tribunal have accepted the explanation tendered by the assessee by referring to the statements of the Manager and the Clerk. In these circumstances, it is not possible to find that the order of the Tribunal suffers from any infirmity which would require interference at the hands of the Court. Accordingly it is held that the Tribunal was right in law in confirming the order of CIT (Appeals) deleting the addition of Rs.1,80,95,811/- in respect of fixed deposits and Rs. 21,71,500/- in respect of the

interest. The question referred to the Court is therefore answered in the affirmative i.e.in favour of the assessee and against revenue.

18 Reference stands disposed of accordingly. There shall be no order as to costs.

(D.A.Mehta, J)

(H.N.Devani,J)

m.m.bhatt